

ESA Overview Module 4 – Section 7, Interagency Consultation Text

Section 7(a)(2) Consultation (slides 11 – 17)

Section 7(a)(2) Consultation

Section 7(a)(2) covers the Consultation Process. This is where agency biologists will likely spend most of their ESA-related time.

Section 7(a)(2) directs agencies to evaluate the effects of their actions on listed species and designated critical habitat, and to “discuss” these actions with the Services.

Actions are identified in 50 CFR 402.02 as those activities or programs ... authorized, funded, or carried out, in whole or in part, by Federal agencies. This connection to a Federal agency is referred to as a “Federal nexus”. If there is a Federal nexus, the action *may* require consultation.

We’ll discuss how to determine whether or not consultation is needed later in this module.

So I have a question for each of you, Debra and Rich – Can you give me an example of a federal action?

Well, one that I can think of is funding for a small solar project where the funds are provided by the Department of Energy. The federal action, then becomes the funds provided by the Department of Energy.

So Rich, how about you.. Can you give me an example of a federal action? Sure, an example would be if the Army Corps of Engineers issues a wetland fill permit. That wetland permit becomes the federal action.

So, Debra and Rich, it sounds to me like if there’s funding, authorization, or the agency is going to carry out the activity, these would be examples of a federal action.

Yes, that’s correct.

The purpose of consultation is to insure proposed agency actions are not likely to jeopardize listed species and/or adversely modify critical habitat. The best scientific and commercial data available are used to make the determination of if, or how, an action may affect a listed species or designated critical habitat

Specifically 7(a)(2) says that:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of endangered species or threatened species or result in the destruction or adverse modification of habitat . . . each agency shall use the best scientific and commercial data available.”

Let’s take a look at the word “Jeopardy”. What exactly does “jeopardize the continued existence of” mean since jeopardy is not defined in the Endangered Species Act. Jeopardy is, however defined in the regulations at 50 CFR 402.02.

To “Jeopardize the Continued Existence of” means to engage in an action that reasonably would be expected, directly or indirectly to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species. The words reproduction, numbers or distribution are very important! Biological Opinions make a determination of jeopardy or no jeopardy by evaluating the effects of an action on a species’ reproduction, numbers or distribution. The jeopardy or no jeopardy Biological Opinion should be supported by the analyses.

But what about destruction or adverse modification? Debra or Rich, can one of you provide me a definition of this?

Sure, decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of “destruction or adverse modification” therefore, the Services are in the process of redefining adverse modification.

At this time, using the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If you wish to read more of this on your own, you can look up *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, (9th Cir. 2004) and the *Sierra Club v. U.S. Fish and Wildlife Service* (5th Cir. 2001)).

The agencies to which Congress designated Endangered Species Act responsibilities are the National Marine Fisheries Service (NMFS) through the Secretary of Commerce and the Fish and Wildlife Service (FWS) through the Secretary of the Interior. These agencies are identified collectively as the Services. The National Marine Fisheries Service is responsible for anadromous and marine listed species such as salmon, dolphins, porpoises, whales, marine turtles when at sea, and corals.

The Fish and Wildlife Service is responsible for all other species, including manatees and nesting habitat for sea turtles. In some cases the jurisdictions of the Fish and Wildlife Service and the National Marine Fisheries Service on a project may overlap. In these instances, one agency would be designated as the lead and would be responsible for writing the biological opinion with input from the other agency.

So, how do we determine whether a project warrants consultation?

Well, Section 7 applies to discretionary Federal actions. Consequently, the first questions to be asked are: Is there a Federal action involved and is it discretionary? In other words, is this project authorized, funded or carried out by a federal agency AND can the agency do anything to the action that will benefit listed species or critical habitat? Can the action agency control or modify the action in any manner? If so, then the agency probably has discretion.

So, Rich when might an agency not have discretion?

Well, there are various types of examples that we can give but one relatively simple one might be if for example, if the Bureau of Reclamation is told to release excess water from a spillway due to a court order.

Thanks, Rich. To determine whether consultation is required . . . the action agency evaluates the proposed project and determines whether listed species, critical habitat, or possibly both, occur or may occur within the action area. Determining the action area as well as species occurrence, may take some research on the part of the action agency biologist. We will cover this a bit later.

If listed species or critical habitat is or may be present, the action agency determines if, or how the proposed action will affect the listed species or critical habitat. This is called the “Effects Determination”. The different conclusions an Effects Determination can have will be explored in upcoming slides. It is important to remember that the requirement for consultation is triggered when an action “*may affect*” a listed species or critical habitat.

Debra can you now take us into the next segment about Action Areas?

Sure.